

FILED
WILLIAMSPORT

JUL 9 2003

Per AK
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,)	
)	
Plaintiff/Respondent,)	
)	CRIMINAL NO. 4:CR-96-239
V.)	[JUDGE MUIR]
)	
DAVID PAUL HAMMER,)	
)	
Defendant/Petitioner.)	

SECOND AMENDED MOTION TO VACATE AND SET ASIDE
CONVICTION AND SENTENCE PURSUANT TO
28 U.S.C. 2255 BY A PERSON IN FEDERAL CUSTODY

1. The court which entered the judgment of conviction under attack is the United States District Court for the Middle District of Pennsylvania.
2. Mr. Hammer was sentenced Nov. 4, 1998.
3. He received a death sentence.
4. Mr. Hammer was convicted of first degree murder pursuant to 18 U.S.C. §1111.
5. Mr. Hammer initially plead not guilty. His plea was changed to "guilty" mid-trial.
6. Mr. Hammer had a jury trial for the determination of sentence.
7. Mr. Hammer did not testify at trial.

8. An appeal was initiated after Mr. Hammer was sentenced. After briefs were filed, Mr. Hammer sought to withdraw his appeals and that request was granted.

9. The appeal was originally submitted to the U.S. Court of Appeals for the Third Circuit. The Court allowed Mr. Hammer to withdraw his appeals on August 31, 2000. U.S. v. David Paul Hammer, 226 F.3d 229 (3rd Cir. 2000), cert. den. 532 U.S. 959 (2001). A motion seeking to reinstate the appeal and withdraw the mandate was denied. Rehearing was denied. U.S. v. David Paul Hammer, 239 F.3d 302 (3rd Cir. 2001), cert. den. 122 S. Ct. 75.

10. Hammer has previously filed petitions with respect to this judgment in federal court.

11. Information regarding the previously filed petitions is as follows:

(a) (1) Name of court: (A) U. S. Court of Appeals for the Third Circuit; and (B) Supreme Court of the United States.

(2) Nature of the proceeding: (A) Motion to Recall Mandate; and (B) Petition for Writ of Certiorari

(3) Grounds raised: See above.

(4) No evidentiary hearing was had

(5) Result: both motions were unsuccessful.

(6) Date of result: (A) Oct. 31, 2000; (B) October 1, 2001.

12. GROUND FOR RELIEF

I. **Ground One:** Hammer's guilty plea was accepted in violation of the 5th, 6th, 8th and 14th Amendments to the Constitution of the United States of America, and Fed. R.Crim.Pro., Rule 11. It was accepted without an adequate factual basis, and the factual basis provided was false and misleading; the plea was not knowingly, voluntarily and intelligently entered and was accepted without sufficient inquiry into medications. The plea was accepted without appropriate safeguards given a variance in Hammer's diagnoses. Hammer was functionally coerced into pleading guilty and the plea was predicated upon an unreliable competency proceeding, among other reasons.

A. Hammer entered a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970).

1. He personally admitted only that his "hands" killed Andrew Marti.
2. No factual basis for the mens rea elements was provided by Hammer.
3. It is unclear on which statements (Hammer's or the Government's) the Court found a factual basis. Ground 5 and supporting facts are incorporated herein.
4. Additional "*Alford*" plea requirements were not undertaken.

B. Hammer was not advised of all consequences of his guilty plea, including:

1. that a plea to the charge amounted to an admission of an aggravating factor.
2. that a guilty plea abandoned conviction for a lesser included offense, including 2nd degree murder. See *Beck v. Alabama*, 447 U.S. 625 (1980).

C. There was insufficient inquiry into Hammer's medications.

1. Dr. Wolfson ("Wolfson") testified at the plea hearing that records showed no recent change to Hammer's psychiatric medications (he did not name them) but Hammer's thyroid medication (synthroid) was altered.
2. Hammer testified that he was taking only synthroid. Synthroid affects certain persons with manic-depressive illness. BOP psychiatrists and others diagnosed Hammer with that illness.

3. The Court did not inquire into the variance in testimony about medication.

4. A defendant not taking his prescribed psychiatric medicines is the functional equivalent of a defendant who has taken nonprescription drugs prior to entry of the plea.

D. Hammer's plea of guilty was not knowingly, intelligently or voluntarily entered because it was a product of medical, chemical and psychological mismanagement of Hammer's condition and a direct and substantial result of Hammer's mental frailties.

1. Hammer was diagnosed with Major Depressive Disorder, Recurrent, around the time of his guilty plea.

2. Hammer's clinically significant depression outwardly manifested itself in various forms, including via (1) swallowing razor blades; (2) overwhelming sadness and crying; (3) constant wavering on whether to plead guilty and request the death sentence or whether to contest the Government's request for death. This was also evidence of Hammer's deep sense of remorse over and trauma resulting from Andrew Marti's death.

3. Hammer's Major Depressive Disorder was not discussed at the guilty plea hearing.

4. Depression is part of another of Hammer's diagnoses (manic-depression or bipolar disorder). Proper care and patient information was not provided about this illness. Proper care and information was not provided about his thyroid medication. Medical and psychiatric mismanagement caused, alternatively significantly contributed to, Hammer's actions (including entering a guilty plea) and Andrew Marti's death.

5. Hammer viewed his options while handicapped by cognitive deficits.

6. The trial and events discussed therein, such as Hammer's turbulent upbringing and Marti's death, individually and collectively served as psychosocial stressors and trauma triggers

(in the psychological sense) rendering Hammer unable to chose a course other than one which would avoid reminders of the traumatic events, that is, avoidance by guilty plea.

Proper medical, psychiatric care and counseling would have mitigated this problem. The only psychologist made available to Hammer was Dr. Mitchell ("Mitchell"). Mitchell could not meaningfully counsel Hammer because of his conflicted status. Ground 2 and supporting facts are incorporated herein.

E. The guilty plea was accepted without implementation of required safeguards.

1. It is generally accepted that to be knowingly, intelligently and voluntarily entered, a guilty plea entered by a non-English speaking defendant must be accompanied by use of an interpreter.

2. Dr. Robert Sadoff, M.D. ("Sadoff"), a highly respected psychiatrist, opined under oath that David Hammer suffers from dissociative identity disorder (hereafter "DID"). Sadoff's qualifications and experience in forensic psychiatry, see TR 5174-5189, far exceed those of Wolfson, see TR 5375-5408.

3. The most contested issue in Hammer's case was his mental state.

4. Sadoff's DID diagnosis required the acceptance of any guilty plea to be accompanied with assistance from a licensed mental health professional experienced in dealing with persons suffering from DID so that a determination as to whether the plea was knowingly, voluntarily and intelligently entered could be reliably made.

5. DID is a complicated disorder and is often mistaken for other disorders. An experienced mental health professional is more likely to reach a reliable determination of whether DID is infecting the free will of a defendant than one reached by a lay person.

Accepting a guilty plea by one who might suffer from DID requires greater care than acceptance of a guilty plea from a person who does not suffer from DID.

6. Despite its centrality to the trial and Hammer's mental state, no inquiry was made into the topic of whether Sadoff had been misled by Hammer.

F. Hammer was functionally coerced into foregoing the insanity defense and hence pleading guilty because of the conditions of his confinement at Springfield.

1. Hammer decided to plead guilty amidst Wolfson's cross-examination; the defense perceived Wolfson as unqualified. At that time the defense perceived that Sadoff's conclusions would likely prevail with the jury since Wolfson's credentials and testimony seemed unimpressive to the jury. This was Hammer's belief as well.

2. If the jury believed Sadoff it was reasonable to assume that Hammer might be found not guilty by reason of insanity (NGRI). If found NGRI, Hammer could be forced to return to Springfield. Hammer's previous experiences at Springfield were maddening, indeed horrific. These include: Hammer was transported to testing sites by masked persons in the middle of the night while chained to a wheel chair; he was forced to wear a stun belt which, if activated, even accidentally, can fatally electrocute the person wearing it; Hammer was subjected to having excrement thrown at him; he was kept awake by the howls of other committed persons; Hammer felt harassed by Springfield staff; he was deprived of any privacy whatsoever and was treated with unnecessary rigor.

3. Hammer's mood was constantly agitated; he was demanding of those outside the institution that he be removed; he constantly complained of the horrific conditions. He told others he never wanted to return to Springfield, indeed he indicated at one point

he would rather die than return there. Hammer also wanted out of U.S.P. Allenwood and wanted a transfer to A.D.X., Florence.

4. Wolfson said Hammer's concerns about Springfield did not factor into his decision to plead guilty. Mitchell's recollection of the same interview was different.

a. Any statements Hammer made to Wolfson about the impact of his Springfield experience on his decision to plead are unreliable. Hammer wanted to plead guilty; he did, against counsels' advice. An admission that the plea was to avoid an NGRI verdict was contrary to Hammer's goal to have his plea accepted.

b. This, among other factors, required Wolfson and Mitchell to discuss this matter with outside sources to insure that Hammer's representations about his motivations were accurate before they were relied upon. (Wolfson previously testified that Hammer was in essence an habitual liar and a manipulative individual who would do or say about anything just to get what he wanted).

c. The Court had an obligation to inquire, at least of counsel, whether avoidance of an NGRI verdict might be motivating the plea.

5. A plea entered because of the fear of being treated inhumanely at the hands of the government if "acquitted" is an involuntary plea.

G. The constellation of these events, disabilities and mental frailties, among other things, forced Hammer to plead guilty. These factors simply overbore his will.

H. The Government should not have used Hammer's statements for the factual basis.

Ground 6 and supporting facts are incorporated herein.

I. The plea was accepted in reliance on the invalid and unreliable competency proceeding which preceded it. Ground 2 and supporting facts are incorporated herein.

J. A manifest injustice would result if claims are not reviewed on their merits. Ground III.L is incorporated herein.

II. **Ground Two:** The proceedings used to determine Hammer's competence to plead guilty, waive counsel and appeals were conducted in violation of the 5th (substantive and procedural due process and fundamental fairness), 6th, 8th and 14th (equal protection) Amendments, 18 U.S.C. §2241 et. seq. The proceedings were both procedurally and substantively flawed in numerous respects, including: the expert's determination was a forgone conclusion given the particular expert selected to determine competency; the expert(s) were conflicted; the results reached were unreliable and incorrect; the proceeding was erroneously expedited and its adverse affect on the penalty phase amounted to judicial comment on the central disputed issue. The conduct of the competency proceedings directly impacted each of Hammer's waivers, his constitutional rights and the penalty verdict. Dr. Wolfson, at all times, had a direct and substantial conflict of interest and his testimony at all proceedings (trial and competency) deprived Hammer of a fair trial.

Supporting Facts

- A. Wolfson examined Hammer at the Government's request.
- B. Wolfson is an employee of the BOP and an agent of the Government. Andrew Marti's death occurred in the BOP. BOP was improperly treating and housing Hammer at the time that Andrew Marti died.
- C. The Government had the authority to use the services of a psychiatrist or psychologist

not employed by the BOP but did not do so here.

D. When a request for evaluation comes into the U.S. Medical Center at Springfield, a somewhat random assignment is made. That procedure was not followed here.

1. Wolfson was not the person originally assigned to evaluate Hammer on the U.S. Attorney's motion.

2. Upon learning that a psychologist was assigned to evaluate Hammer, the U.S. Attorney's Office used its influence and/or authority over the BOP to alter the course of the "random" assignment.

3. The U.S. Attorney's Office succeeded in its efforts to have the previously assigned psychologist removed from Hammer's case.

4. The U.S. Attorney's Office had the psychologist replaced with a psychiatrist as a trial tactic and/or strategy – it insisted on a psychiatrist because of a concern related to the trial of this matter – specifically that the expert it called would have less education than the defense expert.

5. If not before, Wolfson became the U.S. Attorney's agent when the random assignment practice was altered at the U.S. Attorney's insistence.

6. Wolfson got Hammer's BOP records without going through the court or parties; a defense expert could not have done this.

F. Wolfson testified at trial as a Government's witness.

G. Wolfson's primary function was to explore, and if possible debunk, the DID diagnosis reached by Sadoff – a disorder which Wolfson did not believe existed.

H. Had Wolfson diagnosed Hammer with a troubling mental disorder previously

overlooked by BOP mental health staff, he would have subjected his employer to liability.

I. Wolfson was not detached, neutral or conflict free.

J. After his testimony for the Government, Wolfson was appointed by the Court to serve as a Court's expert to evaluate Hammer's competency to plead guilty (and later to waive counsel and appeals).

K. Wolfson was appointed as a Court's expert after he testified for the Government that Hammer was faking mental illness. Because Wolfson had already determined that Hammer had no disorder, his appointment as a Court's expert for competency purposes dictated the result of that proceeding. A doctor who found Hammer was "just fine" and who served as a Government witness was more likely to find Hammer competent than a doctor who found Hammer suffered from a mental illness or a doctor with no pre-existing opinion. A central issue at trial was whether Hammer suffered from a mental disorder. The Court appointed the expert known to have concluded Hammer was simply malingering.

L. Wolfson's conflict in serving as a Court's witness for the competency evaluation had adverse effects on the quality and quantity of information he provided. The conflict is reflected in numerous acts and omissions (in both his competency and criminal responsibility evaluations), including: ignoring and/or downplaying the role the BOP played in mismanaging Hammer's medical and psychiatric symptoms and disorders, ignoring the significance of Hammer's thyroid medication, assessing the existence of and significance of Hammer's manic-depressive illness, factoring in the role of depression and other diagnoses in the responses received.

M. Mitchell, another BOP employee, accompanied Dr. Wolfson during the evaluations to determine competency to plead guilty, waive counsel and appeals determinations.

1. Mitchell, a psychologist, had never conducted a competency evaluation and was unfamiliar with the legal standards governing the analysis.

2. Mitchell received an award and monetary compensation from the BOP for his participation in the proceedings which resulted in Hammer's death sentence.

3. Had Mitchell, in his competency assessment, determined Hammer suffered from a mental illness sufficient to render Hammer incompetent to plead guilty, waive counsel or his appeal, Mitchell would have subjected his employer to potential liability and may have exposed himself personally to professional and legal scrutiny.

4. Mitchell had previously counseled Andrew Marti and had a counseling session with him as recently as 6 weeks prior to Marti's death.

5. While serving as a Court's expert, Mitchell was having ongoing counseling sessions with Hammer at Allenwood. The Government expressed concerns that this might be a conflict.

6. Mitchell was the only mental health professional allowed to counsel Hammer in a private setting at Allenwood after Hammer was sentenced to death.

7. Mitchell was not, neutral, detached or conflict-free.

N. Numerous factors, including those listed above, created the risk that these conflicts affected the motivations, performance, opinions and tasks of the Court's witnesses and thus ran afoul of basic notions of fairness required by law.

O. Mitchell and Wolfson testified at the final competency hearing on October 1, 1998. On August 3, 1998 the Government asserted Mitchell was too inexperienced to evaluate Hammer and raised concerns about Mitchell's ongoing counseling sessions.

P. The testimony of Mitchell and Wolfson at the 10/1/98 hearing reflect the same conflicts which existed previously and their conclusions are unreliable.

Q. The conflicted and unreliable testimony of Wolfson is based upon incomplete questioning or knowledge, lack of awareness of salient medical and psychiatric facts regarding and affecting Hammer's mental state, and/or the unavailability of material evidence. Ground 7 and supporting facts are incorporated herein.

R. The actual, potential and probable adverse affects of the conflicts create a risk that the proceedings cannot be relied upon to have produced a reliable result.

S. The push for a quick evaluation & competency hearing interfered with the adequacy and reliability of the results and conclusions.

T. Wolfson testified for the Government at the guilt phase before he testified as a Court's expert at the guilty plea competency hearing. After Wolfson testified as a Court's expert at the competency proceeding concerning the guilty plea, he took the stand as the Government's witness in the penalty phase. After Wolfson took the stand as a Government's witness at the penalty phase, Wolfson took the stand as a Court's witness at the 1998 competency proceedings.

U. The jury was made aware that: Hammer pled guilty as charged; Wolfson testified at that hearing about Hammer's mental state; and the Court heard evidence and accepted the plea.

These events had the effect of communicating to the jury that: (1) the Court accepted the opinions espoused by Wolfson on Hammer's mental state; and (2) the Court rejected the opinions of Sadoff as to Hammer's mental state. This amounted to the appearance of judicial comment on the evidence. Wolfson should not have been the Court's competency expert.

V. Hammer's cognitive dysfunction was not explored when determining his competency.

W. On 10/1/98 defense counsel asked the Court to take judicial notice of Sadoff's testimony. The Court indicated it would not consider and did not recall the details of the previously submitted DID evidence but that counsel could highlight the relevant portions at argument. No argument was had because counsel was functionally discharged.

X. The wrong competency standard was used in determining whether Hammer was competent to waive his appeals. Ground 3 and supporting facts are incorporated herein.

Y. Hammer's competence was never reliably tested. His substantive and procedural due process rights to plead only if competent and to have a fair and reliable proceeding to determine his competency were violated.

Z. Defense counsel objected to Wolfson serving as a Court's expert.

AA. This error is plain and manifest justice requires review. Ground III.L. is incorporated herein.

III. Ground Three: The dismissal of Hammer's Appeal was Arbitrary; Without additional procedures, appellate waiver should not have been permitted after an *Alford* plea; Hammer's waiver of appeal was not knowingly, voluntarily and intelligently entered and was based on unreliable competency evaluations; Hammer was deprived of counsel at various competency proceedings held on appeal; Hammer independently and separately claims that disposition of his direct appeal issues would result in vacation of his conviction and sentence; the above was permitted in violation of the 5th, 6th, 8th and 14th Amendments to the Constitution, 18 U.S.C. §3591 and contemporary standards for reliability and decency. A manifest injustice would result if review of all issues is not had.

Supporting Facts:

A. Whether Hammer wanted to waive his appeals depended on the day he was asked.

1. The random date that the oral argument was scheduled in the U.S. Court of Appeals for the Third Circuit determined whether Hammer waived his appeals.

2. At the October 1, 1998 hearing, AUSA Martin informed Hammer that he could change his mind about waiving counsel at any time.

3. Hammer changed his mind – he wanted a lawyer and to appeal – but he did so on the wrong (arbitrary) day.

4. This procedure resulted in the arbitrary dismissal of Hammer's direct appeal.

B. Acceptance of each of Hammer's waivers was based in part on each of the tainted competency proceedings. Ground 2 and supporting facts are incorporated herein.

C. The wrong standard was used by the District Court and the U.S. Court of Appeals for the Third Circuit when determining whether Hammer was competent to forgo appellate rights.

1. The correct standard is more exacting than the competence to stand trial or plead guilty standard employed in prior proceedings.

2. The correct standard has various elements including: assuming a person's disorder does not prevent him from understanding his legal position and the options available to him, does that disorder prevent him from making a rational choice among the options which are available to him?

3. This inquiry requires that the choices made be unencumbered by mental frailties. The rational choice requirement demands something more than a decision grounded in logic or one that is logical. Application of this standard to Hammer's appellate waiver shows that he did not meet this test.

4. Within the 48 months preceding this waiver Hammer was exhibiting the symptoms of, receiving medication for, or had been diagnosed with one or more of the following: bipolar disorder (manic-depressive illness), post traumatic stress disorder,

SHU (special housing unit) Syndrome, DID, Major Depression, seasonal depression, various personality disorders, suicidal ideation and cognitive frailties.

5. These illnesses were exacerbated by medical conditions, including diabetes and hypothyroidism and by various psycho-social stressors within the meaning of the Diagnostic and Statistical Manual (currently DSM-IV). Hammer was indeed on medication at the time of his appearance before the Third Circuit.

6. Smart and articulate people can be mentally ill. That Hammer appeared smart and articulate does not mean that his waiver satisfies the test outlined above.

7. That Hammer at one time decided to continue his appeals because a notice was inadvertently filed is but one example of the irrationality of the decision-making at work.

8. The mental health professionals evaluating Hammer's competency also used the wrong standard.

D. The panel presiding over the waiver argument misapprehended Hammer's comments. Judge Greenberg stated: "This man came in here and told us he murdered this man and he wanted to be executed." Hammer did not state that he committed first degree murder (premeditation and malice aforethought). Ground 1 and supporting facts are incorporated herein.

E. A condemned person's waiver of appeal accompanied by a denial of an element of the offense requires, much as an *Alford* plea requires, that the Court be satisfied of the defendant's guilt beyond all doubt. Grounds 4, 6 and 7 plus supporting facts are incorporated herein.

F. Hammer's decision to waive his appeals was not intentionally, knowingly and voluntarily made.

G. Hammer was given inadequate and incorrect advice during the appellate argument:

1. He was told the most favorable direct appeal remedy was imposition of a sentence of life without the possibility of parole (LWOP) or a new penalty phase (at which a jury would pick either death or LWOP). This is not so.

2. Several issues, including a challenge to the factual basis for the guilty plea, would have resulted in a new trial.

3. Given Hammer's contradictory statements regarding this topic (of no chance for success on appeal and that "success" at best meant LWOP), the failure to provide Hammer with correct information makes the waiver invalid. Hammer was personally unaware of the accurate options available to him at the time of the appellate argument.

4. Without the possibility of a new trial, other options to be considered, such as an acquittal or conviction of a lesser included offense, would be unavailable to Hammer.

H. To the extent that the proceeding in the U.S. Court of Appeals for the Third Circuit was also a hearing to determine Hammer's competency to waive appeal and/or his competency to be executed (some questions asked suggest both), then Hammer had no notice of and no lawyer to represent him on these matters and these rights could not be waived until it was determined that Hammer was indeed competent. Hammer contends that the Constitution does not permit counsel to be waived at competency determinations (be that competency to waive appeals or be executed). The Government requested that Hammer undergo a competency evaluation prior to argument; Hammer was not sent for another evaluation.

I. In isolation or combined, these factors show Hammer's waivers, and his inability to retract them, were encumbered by a constellation of factors rendering them involuntary and their enforcement fundamentally unfair & arbitrary.

J. Hammer asserts he need not show prejudice from acceptance of invalid waivers.

K. Hammer alternatively claims that if same is required, Hammer would have been successful on one or more of the following claims presented (this list is taken directly from the table of contents to the Brief of Appellant tendered on direct appeal): (1) The trial judge fatally confused and mislead the jury on what would occur if it did not reach unanimous agreement; (2) The trial court's final instruction that the jury could return a sentence of death if "sufficiently persuaded" that death was the appropriate verdict was error that was compounded by the trial court's contradictory instructions during the orientation and just prior to the commencement of the penalty phase; (3) The jury's failure to find, consider and weigh undisputed or conceded mitigating factors is a circumstance that renders Hammer's sentence arbitrary; (4) The sentence of death must be vacated since the government relied upon numerous instances of unadjudicated criminal conduct to convince the jury to sentence Mr. Hammer to death; (5) The trial court lacked authority to "leap frog" its death sentence over the state sentences appellant was serving at the time of his conviction and sentence of death; (6) The trial court erroneously denied numerous defense challenges for cause; (7) The trial court should have granted the defense motion for a mistrial when the victim's father broke down in tears on the witness stand; (8) A federal death-penalty jury should not be allowed to consider non-statutory aggravating factors; (9) The Government's duplicative use of statutory and non-statutory factors derived from the Upton shooting in 1983 renders the sentence of death invalid; (10) The trial court should have granted the pretrial motion to dismiss the statutory aggravating factor that the murder was committed in a manner that was especially heinous, cruel or depraved; (11) The trial court should have granted appellant's mistrial motion based on the trial judge's sua sponte interruption of, and

plainly visible anger with, the opening moments of defense counsel's penalty phase summation; (12) Hammer's sentence of death was imposed in violation of the grand jury clause of the 5th Amendment...since the indictment did not allege the elements of a capital offense; (13) The court should have granted a new trial since "purchased" testimony was presented in violation of the anti-gratuity statute, 18 U.S.C. §201(c); (14) The court erred in failing to hold a factual hearing on the assertion that Hammer was arbitrarily and capriciously selected for capital prosecution; (15) Hammer's conviction and sentence must be set aside because the factual basis set forth during the guilty plea colloquy was inadequate to support a plea of guilty...; (16) The matter should be remanded to the trial court for a factual hearing on a breach of confidential information by the United States Marshals Service, Regarding the names and locations of defense witnesses; (17) The death penalty constitutes cruel and unusual punishment, and therefore, Mr. Hammer's sentence of death must be set aside.

Once his direct appeal is restored, Hammer will likely also raise other meritorious issues, including issues and subissues included within this petition.

L. Hammer separately and independently claims each issue should be reviewed on the merits. Whether competent or not when he waived his appeals, a manifest injustice would result within the meaning of *U.S. v. Khattak*, 273 F.3d 557 (3rd Cir. 2001) if no review is had.

He also asserts that the issues included in the abandoned direct appeal brief present plain errors and that there exists cause and prejudice for their previous exclusion from the direct appeal process. He also asserts that independent of whether the error would constitute plain error that cause and prejudice exist justifying review now.

The "cause" includes but is not limited to: Hammer's medical and psychiatric

mismanagement by the BOP throughout the proceedings; his incompetence to waive counsel and his appeals when the proper standard is applied; his various mental illnesses and the untreated psychological trauma which came to bear on Hammer during the proceedings; and the Government's interference of Hammer's decisions through suppression of evidence and presentation of false or misleading evidence. The prejudice includes but is not limited to the meritorious issues presented in this petition and the brief tendered on direct review.

Hammer also asserts that a manifest injustice of a different kind would occur if his claims are not reviewed on the merits. He asserts a fundamental miscarriage of justice will result if his claims are not reviewed on the merits because it is more likely than not that no reasonable juror would have convicted Hammer in light of the evidence that he falsely confessed. Grounds 6 & 7 plus supporting facts are incorporated herein.

IV. Ground Four: Evolving standards of decency, fundamental fairness and the 5th and 8th Amendments require that Hammer's plea be vacated, alternatively that he be permitted to have a direct appeal.

Supporting Facts:

A. Given the finality of capital sentences and the Government's functional and physical participation in causing the death of a condemned person, contemporary standards of decency and ever-growing knowledge that the system can and does condemn people to death who are innocent or not guilty, requires that additional procedures and precautions be taken. It is also accepted that people confess to offenses they did not commit.

B. Before a condemned person may waive a capital appeal and "agree" to be killed, the appellate court should satisfy itself -- by independent investigation and through use of a higher standard for waiver than those previously announced -- that the person is guilty beyond doubt.

C. Application of this standard to Hammer's case would require Hammer's waivers to be refused on at least two theories. Ground 6 and supporting facts is incorporated herein.

D. Hammer entered an *Alford* plea (Ground 1 and supporting facts are incorporated herein) and such pleas are not reliable enough to be used in capital cases where the conviction upon plea substantially amounts to proof of eligibility and an aggravating factor. The constitution demands that waiver of appellate review may never be accompanied by an *Alford* plea.

E. A condemned person cannot waive direct appeal. The previous decision in this case to the contrary should be reconsidered.

F. Review of this claim entitles Hammer to a vacation of his plea, alternatively a new appeal. Ground III.L. is incorporated herein.

V. **Ground Five: The Court's failure to personally advise Hammer that it would grant a motion to withdraw the guilty plea during the penalty phase violated Fed.R.Crim.Proc. 11 & 32, due process, the right to be present and to have the guiding hand of counsel to assist in such decisions.**

Supporting Facts:

A. During opening statement at the penalty phase, the defense argued that although Hammer "pled guilty" to first degree murder and the court accepted that plea, the guilty plea did not amount to an "admission" of the *mens rea* element of first degree murder. Counsel argued: "[i]n pleading guilty to this offense Mr. Hammer used words that you've heard before...these hands took the life of Andrew Marti." [TR. 5942]

B. Immediately after the above statement was made the Court *sua sponte* ordered the parties to the bench. A discussion took place "between the Court and counsel." [TR. 5942]. The

Court indicated it had no recollection of such a statement, suggesting it had no recollection of Mr. Hammer's failure to admit the intent element. The Court indicated "Now, this man pled guilty, and if you want me to revoke his plea I'll do it." [TR. 5942]. The record reflects that this was not communicated to Hammer.

C. Hammer's plea must be set aside. Ground III.L. is incorporated herein

VI. **Ground Six:** The Government or its agents knew or should have known that Hammer's statement was materially false and unreliable, yet it presented it the jury and judge (at the guilty plea) without correcting the false or misleading impression. Had the Government corrected the false or misleading impressions it left there exists a reasonable probability that the decision of the jury could have been affected, that Hammer's decision to plead guilty could have been affected, that the Court's decision to accept the plea could have been different, and that the decision of the Third Circuit to permit an appellate waiver could have been different.

Similarly, the Government (and/or agents) concealed favorable evidence from the defense, namely the physical facts which prove that Hammer's statements are unreliable, if not false, such that there exists a reasonable probability that all of the above named proceedings would have been different.

All of the above violates the 5th, 6th, 8th and 14th Amendments.

Supporting Facts:

A. The Government (or its agents) knew or should have known that its evidence and argument was false and/or misleading such that the Government was under a duty to correct it.

B. To the extent the Government had no actual knowledge of the falsity of the evidence, it should and would have known Hammer's statements and evidence surrounding those statements were false if a thorough and unbiased investigation would have been undertaken.

C. The Government-sponsored false/misleading evidence includes but is not limited to Hammer's statement that: (1) Andrew Marti was killed after approximately 2:15 a.m. on the morning of 4/13/96; (2) Hammer strangled Marti while putting pressure on his back; (3) Marti was killed while tied face down in the bed in which his body was found; (4) Marti died as a result of strangulation while he was tied face down in the bed; (5) Hammer killed Andrew Marti while he was tied face down in the bed in furtherance of the "hostage" ruse; (6) Marti died in the position his body was found; and (7) Andrew Marti died in the manner Hammer described.

1. Evidence used to support the factual basis by the Government's at the guilty plea hearing as to premeditation and malice was misleading, if not blatantly false.

2. The Government used these statements before legal proceedings were initiated and throughout them in asserting that Hammer was guilty of first degree murder and deserved to be executed.

3. Unreliability of the statement including the pressured speech when initially giving it also gives rise to claims supporting suppressing the statements.

B. Accurate facts conflict dramatically with Hammer's false statements. There exists a reasonable possibility that correction of the false and/or misleading impressions could have affected numerous decision-makers and decisions during all proceedings.

1. The decision-makers impacted include: Hammer; the Court; defense counsel; the jury; members of the Third Circuit; the committee which might authorize dismissal of the death penalty or the charges; and mental health professionals

2. The decisions impacted include: the decision to continue Hammer's prosecution and/or pursue his death sentence; decisions regarding Hammer's mental state

and all proceedings relevant thereto, such as suppression of statements, competency, possible defenses and what if any criminal act Hammer actually engaged in; whether Hammer would be permitted to and/or desired to plead guilty and/or put up certain mitigating evidence; and what psychiatric treatment and medications Hammer should receive given the events of the morning of 4/13/96 (impacting his mental status).

3. The import of correcting these false and misleading impressions is significant.

a. Correction of them would have manifested itself in several ways, including, most principally: the statement's blatant inclusion of materially false facts is entirely consistent with a DID black out (and shows that Hammer, while trying desperately to incriminate himself, was singularly unable to recall accurate facts); and

b. are entirely consistent with a false confession to first degree murder to cover up evidence of an accidental killing during a sexual encounter (with the motive to incriminate being both remorse and the fear of reprisal in prison if the encounter was learned by other inmates).

C. Hammer is entitled to a new trial. Ground III.L. is incorporated herein.

VII. Ground Seven: The Government presented and failed to correct important evidence which it or its agents knew or should have known was false or misleading such that there exists a reasonable possibility that the result of all proceedings (including Hammer's expressed desire to plead guilty) could have been different. Hammer independently asserts that the Government: suppressed documentary evidence, suppressed physical evidence and/or destroyed readily apparent material evidence or potentially useful evidence, all in contravention of the 5th, 6th, 8th and 14th Amendments. Alternatively, newly discovered evidence requires a new trial.

Supporting Facts:

A. The Government failed to disclose a BOP document indicating that Hammer had been diagnosed with bipolar disorder and if unmedicated would likely engage in “*irrational behavior*” (emphasis added). The document is dated 4/10/96. That BOP recognized Hammer’s behavior could be irrational if unmedicated is relevant both to his primary trial and penalty phase defense as well as his unmedicated status at various points in the competency proceedings.

Disclosure of the document would have raised significant questions and spawned further defense inquiry into the BOP’s conduct and its investigation into David Hammer’s alleged culpability and Andrew Marti’s death. Further inquiry would have produced substantial and serious questions. Grounds 2 and 6 and their supporting facts are incorporated herein. The diagnosis itself required that Wolfson’s testimony be corrected because it was false and/or misleading regarding Hammer’s diagnoses while incarcerated. Wolfson’s misleading and/or false testimony was supplemented by other witnesses who testified about Hammer’s mental health issues while incarcerated suggesting that Hammer had not received a diagnosis of the disorder in question. Had the false/misleading testimony been corrected, there exists a reasonable possibility that the result of each proceeding could have been different.

The Government also suppressed BOP documents from May 1998 showing that Hammer had refused various medications which would raise serious questions about his competency, especially in light of the bipolar diagnoses referenced above. The refusal of these medications occurred around the time Hammer swallowed razor blades.

B. FBI Agent Callaghan testified that he was not provided with any DNA samples removed from Andrew Marti’s mouth. The pathologist testified she took oral swabs.

C. Upon questioning by the Government, Callaghan suggested that tests run on samples

removed from oral cavities would have been meaningless since Callaghan would not have had any other DNA samples to compare against the oral samples (i.e., leaving the grossly misleading suggestion that Hammer would not have provided samples or that the Government could not have compelled him to do so). Callaghan also suggested that testing oral swabs would be somewhat generally meaningless even if they were provided to him.

D. The false or misleading impressions include: that oral samples would be unsuitable for comparison; that Hammer would not have provided them; and/or that the Government could not have compelled them (if indeed the Government did not already possess this information). The Government did not correct this false or misleading impression.

E. It is unknown if these swabs were destroyed. If destroyed, their materiality or alternatively their usefulness was apparent. If tests were done but the results were not disclosed to the defense the Government violated its statutory and constitutional obligation to timely disclose favorable material evidence

F. It is also unknown if the clothes removed from Andrew Marti and David Hammer were tested and if so the results of those tests. If those items were destroyed their materiality was apparent, alternatively, their usefulness was apparent.

G. The Government and/or its agents destroyed latex gloves recovered inside of Cell 103. Their materiality was apparent to any theory regarding a sexual encounter (which Hammer submits the F.B.I and BOP suspected all along), alternatively, potential usefulness was apparent.

H. The Government suppressed favorable evidence material to guilt and punishment discovered in Winter 2000 in the form of what appears to be a Government memo indicating among other things that Mr. Marti specifically requested to cell with Hammer (letters regarding

this were exchanged between Mssrs. Travis and Fred Martin 10/27/00 to 12/18/00).

I. The Government suppressed favorable evidence material to guilt and/or punishment which disputed facts alleged by the Government and/or impeached Government witnesses. Hammer has recently learned that the Government received information from James Hauser, an inmate known to Hammer. To the best of counsel's current knowledge Mr. Hauser supplied information to the Government regarding his conversations with Hammer. This information was reportedly not disclosed to defense counsel because, *inter alia*, it was contradictory to the prosecution and/or information provided by inmates at the Allenwood Penitentiary.

J. Hammer is entitled to a new trial. Ground III.L. is incorporated herein.

VIII. Ground Eight: Hammer's waiver of counsel for purposes of post-trial motions and direct appeal did not comport with the 5th, 6th, 8th and 14th Amendments because he was not properly advised about the risks of proceeding pro se.

Supporting Facts:

A. At the 10/1/98 hearing, Hammer was told he had a right to self- representation.

B. Through questioning by the Court and Government counsel, it became known that Hammer had previously gone *pro se* but Hammer was not advised about the risks of proceeding *pro se*. These are separate concepts. The former provides information to the court so it can determine whether to accept the waiver, the latter provides information to the defendant so he can decide whether he truly wishes to waive his right to counsel.

C. Hammer is entitled to a new appeal. Ground III.L. is incorporated herein.

IX. Ground Nine : The Due Process requirement that the trial court inquire *sua sponte* as to a defendant's competence in every case in which there exists a reason to doubt the defendant's competence was not followed; a new trial is required.

Supporting Facts:

A. Confirmed by x-ray, the Court learned that during jury selection Hammer swallowed two razor blades. The Court was aware of this via conference with the Allenwood physician.

B. Hammer requested to waive presence that afternoon.

C. The Court refused Hammer's request. Attorney Ruhnke indicated that based upon his knowledge of Hammer it was possible that Hammer might lose control if he was required to stay in the courtroom. The Court again refused the request.

D. The day Hammer swallowed the razor blades, BOP placed him on special watch because of a concern he was suicidal; he was given medications, including: anti-anxiety medication and a tripled dose of synthroid (which may have been for his thyroid condition).

E. This was reasonable cause to inquire into competency. But see Factual Finding #1 at 25 F. Supp.2d 518. Ground III.L. is incorporated herein.

X. **Ground Ten: Hammer was constructively and functionally denied counsel when the Court failed to honor trial counsels' request to withdraw based upon a conflict of interest and to appoint counsel to investigate Hammer's competency to waive counsel, proceed *pro se* and waive appeals.**

Supporting Facts:

A. Hammer informed all he desired to discharge counsel and waive his appeals.

B. Hammer's defense counsel (Mr. Travis and Mr. Ruhnke) asked to withdraw their appearances because of a conflict created in the attorney-client relationship. Counsels' ethics dictated that they could not assist Hammer in taking a course they believed to be horribly dangerous nor could they violate his wishes and contest his position. A motion to withdraw was filed 8/5/98. The Court denied defense counsels' request. Hammer was appointed another attorney (Mr. Smith) to advocate the position which Mr. Travis and Mr. Ruhnke could not

ethically support. Smith was appointed by Order dated 8/10/98.

C. Hammer was left with counsel (Mr. Ruhnke and Mr. Travis) whose ethics forbade them from advocating a position contrary to Hammer's desire to waive his appeals but also forbade them from actively taking action to support Hammer's position.

D. For example, at the 10/1/98 competence hearing to determine whether Hammer would be permitted to waive counsel and his appeal, defense counsel were asked whether they had any evidence to present. Counsel asked the Court to take notice of Dr. Sadoff's prior testimony. The Court refused to do so. Instead it said counsel could argue the salient facts. Counsel were functionally discharged by the conclusion of that hearing and, thus, counsel did not make argument regarding additional facts which showed that Hammer should not have been permitted to waive counsel & appeal.

E. A person suffering from DID and/or manic-depression may be competent to waive counsel or his appeal one moment and incompetent later. Even if Hammer was competent at the relevant moment on 10/1/98, that does not mean his status remained constant throughout appellate proceedings.

F. Hammer was constructively denied counsel when the Court denied counsels' withdrawal request and failed to appoint counsel to investigate, and if necessary pursue, competency issues even though same was contrary to Hammer's stated desires. Hammer was entitled to counsel who could ethically protect his substantive and procedural due process rights. Such investigation would have been fruitful.

G. Ground III.L. is incorporated herein.

XI Ground Eleven: The Court's failure to inquire on the record into an actual conflict

of interest when alerted to same violated the 5th, 6th, 8th and 14th Amendments.

Supporting Facts:

A. The Court was alerted to a conflict by trial counsels' motion to withdraw filed August 5, 1998. Ground 10 and supporting facts are incorporated herein.

B. Counsel unambiguously informed the Court that their ethics forbade them from actively pursuing a course contrary to Hammer's stated desires. The Court erroneously refused counsels' request to withdraw. A timely objection, without inquiry into the issues is problematic. Counsels' ethical "catch-22" prevented them from factually investigating facts which if produced would be contrary to Hammer's wishes. Because of the conflict, the mismanagement of Hammer's psychiatric and medical condition was not investigated. The conflict had an adverse effect on the representation. Grounds 1, 2 and 7 and the supporting facts are incorporated herein.

C. Hammer must be placed back in the position he was in when the Court was alerted to the conflict. Once there, Hammer asserts he no longer wishes to waive counsel or his appeals. Ground III.L. is incorporated herein by reference.

XII. Ground Twelve: The cumulative impact of all the errors alleged requires a new trial.

Supporting Facts:

All of the above grounds and the amended grounds added below and supporting facts for each are incorporated herein.

XIII. Ground Thirteen: Hammer was functionally deprived of his constitutional right to counsel at all critical stages of the proceedings when the court set the hearing on

Hammer's competency to plead guilty within hours of Hammer's stated desire to plead guilty such that no competent attorney could investigate and be adequately prepared for said hearing. Alternatively and separately, Hammer claims he was deprived of the effective assistance of counsel at said competency hearing and was independently deprived of his right to effective assistance of counsel by counsels' failure to investigate the veracity of Hammer's confession and the physical and medical facts upon which it relied.

Supporting Facts:

- A. Hammer pled not guilty by reason of insanity at trial.
- B. Mid-trial, Hammer -- against the advice of counsel -- entered a plea of guilty.
- C. The court correctly determined that a competency hearing was necessary.
- D. The competency to plead guilty hearing was held the very same day that Hammer stated his desire to plead guilty and within hours of the time that Hammer's desires were communicated to the Court.
- E. No reasonably competent attorney could adequately represent Hammer at this proceeding given the severe time limitations. The inordinate amount of documentary information available regarding Hammer's then-relevant medications and psychiatric status could not be reviewed and digested during the limited period of time, nor was there sufficient time for an independent expert to be appointed and consulted.
- F. Hammer was functionally deprived of counsel at this hearing. Ground II is incorporated herein.
- G. Alternatively and separately, Hammer's counsels' omissions in not obtaining records regarding Hammer's medications and treatment and failure to consult an independent expert regarding same was below the norm. But for this omission there is a reasonable probability that the result of the competency proceeding would have been different in numerous scenarios,

including: (a) Hammer would have been found incompetent at the time to enter a guilty plea; and/or (b) delay in the proceedings due to questions about his competence (and proper medication) would have altered Hammer's desire to plead guilty against counsels' advice.

H. Counsels' failure to investigate the veracity of Hammer's statements made to authorities after Mr. Marti's body was discovered and to otherwise investigate the veracity of conclusions drawn regarding the physical evidence and pathology findings was below prevailing norms of reasonably competent counsel. The failure to investigate and present evidence concerning the veracity of Hammer's confession and to challenge the Government's reliance upon it was below prevailing norms. But for these omissions there is a reasonable probability that the result of numerous proceedings would have been different. Those proceedings include: the government's decision to authorize the filing of a death charge, the motion to dismiss that charge, the entry of Hammer's guilty plea, the jury's verdict at the penalty phase, and the decisions to permit Hammer to waive his appeals and counsel.

XIV Ground Fourteen: Hammer's conviction and sentence are violative of the 8th and 14th Amendments to the Constitution of the United States because the Government suppressed exculpatory material relevant to Hammer's competence (at all phases), guilt, and penalty. Alternatively, fundamental fairness was violated when Hammer's various competence determinations were predicated upon the testimony of witness who received a monetary award from the Federal Government for his participation in Hammer's case.

Supporting Facts:

A. At least three Government witnesses, one of whom also served as the Court's witness at the various competency hearings, received monetary rewards for their participation in the investigation and prosecution of Petitioner Hammer. These witnesses include: John Mitchell, Don Troutman and Chaplin B. Crook.

B. The Government did not advise trial counsel of these rewards or that these persons were being considered for such awards.

C. But for the Government's suppression of this material information there exists a reasonable probability that the result of the various proceedings (named above) would have been different.

D. The facts supporting Ground II are incorporated herein by reference.

XV Ground Fifteen: Hammer's sentence was imposed in violation of the 5th, 6th, 8th and 14th Amendments because the FDPA is unconstitutional in that it permits prosecution for the death penalty without first requiring a grand jury to indict on all essential elements of the offense and because it permits traditionally inadmissible evidence to be introduced at the penalty phase in support of essential elements. Had a jury been impaneled and required to consider whether there was sufficient evidence to support a capital murder charge, they would have rejected a death penalty prosecution.

Supporting Facts:

A. On September 18, 1996 Hammer was indicted in two counts for violations of 18 U.S.C. §1111 (first degree murder within the territorial jurisdiction of the United States) and 18 U.S.C. §1118 (murder by a federal prisoner serving a life sentence). The § 1118 charge was dismissed pretrial.

B. On April 9, 1997, the United States filed a Notice of Intent to Seek the Death Penalty alleging additional elements - specifically, intent and various aggravators - supporting a prosecution for capital murder.

C. The elements referred to in paragraph B above were never submitted to a grand jury.

D. 18 U.S.C.A. §3593 (c) directs the Court to ignore the rules of evidence when determining the admissibility of evidence at the penalty phase. Evidence is admissible so long as

it is relevant and its probative value outweighs the danger of creating unfair prejudice, confusing the issues, or misleading the jury.” This standard was utilized at Hammer’s trial.

XVI Ground Sixteen: Hammer’s 6th and 14th Amendment rights were violated when the Government placed its agent in a position to obtain information from Hammer concerning the killing of Andrew Marti after the right to counsel had attached.

Supporting Facts:

A. James Hauser was encouraged by the Government to obtain information from Hammer regarding the death of Andrew Marti after Hammer had been indicted in this matter. Hauser did obtain information and provided same to the Government during the pendency of this case.

13. Reasons that some grounds were not previously presented include but are not limited to: they required proof outside the record, they were not ripe, evidence was suppressed, various waivers of issues were entered while Hammer was being psychiatrically and medically mismanaged, along with each of the reasons set forth above in Ground III. Paragraph L, above.

14. There is no petition or appeal now pending in any court as to this judgement.

15. Names and address of each attorney who represented Mr. Hammer is as follows:

(A) At preliminary hearing: unknown

(B) At arraignment and plea:

(1) Ron Travis, Rieders, Travis, Huphry, Harris, Waters & Waffenschmidt, 161

W. 3rd St., Williamsport, PA 17703;

(2) David Ruhnke, Ruhnke & Barrett; 47 Park St., Montclair, NJ 07042.

(C) At trial: Mssrs. Travis and Ruhnke, addresses above.

(D) At sentencing: Mssrs. Travis and Ruhnke; addresses above.

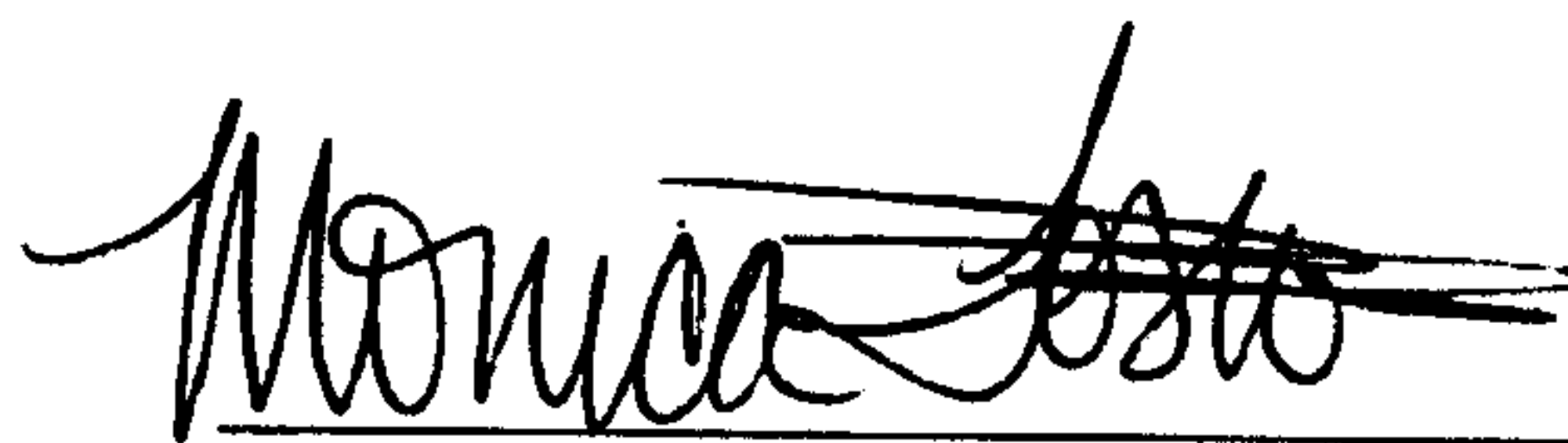
(E) Mr. Hammer was *pro se* on direct appeal; Mssrs. Ruhnke and Travis were appointed as standby counsel.

(F) Undersigned have been appointed by the Court to represent Mr. Hammer here.

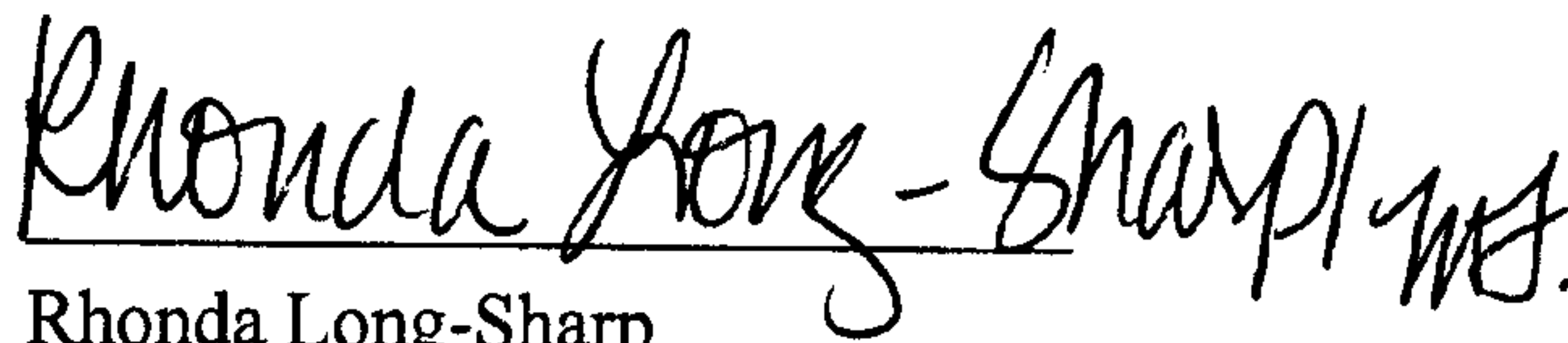
16. The indictment alleged two counts of murder for the death of a single person. The second count was dismissed prior to trial. A single death sentence was imposed after a plea of guilty to first degree murder.

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? No.

Wherefore, David Paul Hammer, by counsel, prays that the Court grant him all relief to which he may be entitled in this proceeding.



Monica Foster



Rhonda Long-Sharp

I declare under penalty of perjury that the foregoing is true and correct.

Dated: May 21, 2003



David Paul Hammer

Monica Foster
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